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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 507

MARYLAND CASUALTY COMPANY,
Petitioner,

—against—

FIRST NATIONAL BANK IN YONKERS,
Respondent,

and

THE CITY OF NEW YORK, WILLIAM CASEY & SONS, INC., UNITED STATES OF AMERICA, CHARLES H. HANSON, CHARLES W. GRANT, JAMES MARTIN, ROBERT M. JOHNSON, As Trustees of the New York City Carpenters' Welfare & Pension Fund, and LIBERTY MUTUAL INSURANCE COMPANY,
Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANKLIN NEVIUS,
Attorney for Petitioner,
115 Broadway,
New York 6, New York.

Of Counsel
EMIL V. PILZ
J. EDWARD DAVEY, JR.

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No.

MARYLAND CASUALTY COMPANY,

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—against—

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THE CITY OF NEW YORK, WILLIAM CASEY & SONS, INC., UNITED STATES OF AMERICA, CHARLES H. HANSON, CHARLES W. GRANT, JAMES MARTIN, ROBERT M. JOHNSON, As Trustees of the New York City Carpenters' Welfare & Pension Fund, and LIBERTY MUTUAL INSURANCE COMPANY,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The above named Petitioner, Maryland Casualty Company (hereinafter referred to as "the Casualty Company"), respectfully shows to the Court as follows:

This is a petition for a writ of certiorari to the United States Court of Appeals, Second Circuit, to

review that portion of the decision of that Court which reversed that part of the judgment of the United States District Court for the Southern District of New York in favor of the Casualty Company as to the First National Bank in Yonkers (hereinafter referred to as "the Yonkers Bank"), and remanded the action with directions to enter judgment in favor of the Yonkers Bank in the sum of $47,133.90.

Opinions of the Courts Below

The opinion of the United States District Court for the Southern District of New York is reported at 177 F. Supp. 175 (156a-167a).* The opinion of the Court of Appeals, Second Circuit, is reported at 290 F. 2d 246.

Jurisdiction

The decision of the Court of Appeals was dated and entered April 27, 1961. The petition for rehearing of the Casualty Company was denied August 1, 1961. The jurisdiction of this Court is invoked under U.S.C. Title 28, section 1254.

Question Presented

Whether petitioner, the Casualty Company, by reason of its blanket indemnity agreement and bond with William Casey & Sons, Inc. (hereinafter referred to as "Casey"), of October 4, 1955, or the Yonkers Bank, by reason of its assignment from Casey of

* The letter "a" signifies references to the Court of Appeals appendices.

February 7, 1956, is entitled to the sixth progress payment in the amount of $47,133.90 presently held by the City of New York (hereinafter referred to as the "City") and attributable to work performed by Casey.

Statement

The facts are as follows:

On October 18, 1955 the City, acting through its Commissioner of Public Works, entered into Contract with Casey whereby Casey was to construct certain sewers (63a). In connection with said contract, performance and payment bonds were executed by Casey, as principal and the Casualty Company, as surety, on October 4, 1955 (42a-52a).

Casey commenced the work and after working on the project for at least 2 months, assigned on February 7, 1956, to the Yonkers Bank "all money * * * due or to become due" under the contract in exchange for "$1 and other valuable considerations" (64a). Thereafter the Yonkers Bank made continual advances to Casey in the amount of $50,000 no part of which has been repaid (64a).

During the month of May, 1956, the Casualty Company, at the request of Casey, advanced $57,993.91 so as to enable Casey to meet its payroll and to purchase materials necessary for the performance of its contract (138a). Despite this assistance from the Casualty Company, Casey was unable to continue with the work and suspended operations at the project some time before June 4, 1956. Thereafter, on June 6, 1956,

the City, through its Commissioner of the Department of Public Works, demanded that Casey show cause why it should not be held in default (141a). Pursuant to this notice, hearings were held on June 11 and June 13th, and on the latter date, Casey was formally declared to be in default (143a). Thereafter, and in accordance with the demand made upon it by the City, the Casualty Company completed the contract at a net loss to it of $682,637.52 (133a).

Under the terms of its contract with the City, Casey was entitled to submit to the Engineer a requisition for progress payments no oftener than once a month (139a). With respect to such payments its contract provided that after the requisition was submitted, the City engineer, if the requisition were satisfactory, would within eight days of the submission, certify a voucher for the payment which the Commissioner of Public Works would approve after which the voucher would be delivered to the Comptroller for payment within fifteen days from the filing of the voucher in his office. Casey, shortly after May 15, 1956, submitted a requisition for the sixth progress payment for work performed prior to that date. The City Engineer approved the requisition and prepared a voucher for the approval of the Commissioner of Public Works. By May 28, 1956 the Deputy Commissioner of Public Works approved a voucher in the amount of $47,133.90. The approved voucher was then forwarded to the Comptroller's office on May 28, 1956 and was filed there on May 29, 1956 (131a).

Article 41 of the City Contract provides that the contractor shall submit to the Comptroller in connection with any application for partial payment a veri-

fied statement in the form prescribed by the Comptroller setting forth the information required under Section 220-a of the New York Labor Law; but by the time the voucher was to be paid (15 days after May 29, 1956) on the 13th of June, 1956, Casey was already in default under its contract and could not supply such affidavit because it had not paid its workmen for as the Trial Judge pointed out the surety paid the payrolls and material bills (158a).

The action was originally commenced by the Yonkers Bank in the New York Supreme Court, New York County in order to recover the amount of the sixth progress payment presently held by the City. Joined as defendants were: The City; Casey; the Casualty Company; four individual trustees of the New York City Carpenters' Welfare & Pension Fund which obtained a judgment against Casey for welfare and pension fund contributions due for the years 1955 and 1956; Liberty Mutual Insurance Company (hereinafter referred to as "Liberty Mutual") which, having furnished workmen's compensation and public liability insurance coverage to Casey for the project, claimed the sum of $39,903.24 for unpaid insurance premiums, and the United States of America (hereinafter referred to as the "United States") which claimed that Casey was liable to it for $110,390.83 in taxes withheld from wages paid by it at the construction project.

Pursuant to 28 U.S.C. §§ 1444 and 2410, the United States removed the case to the United States District Court for the Southern District of New York where it and the Casualty Company moved for summary judgment. In its opinion dated July 28, 1959, the

District Court granted the motion of the Casualty Company but denied that of the United States (156a-167a). It did so on the grounds that Casey was legally in default at least as early as June 6, 1956, and that therefore there was as of that date no obligation payable from the City to Casey; hence, no funds to which the government's tax lien or the rights of the Yonkers Bank, as assignee of Casey, could attach. With respect to the conflicting equities of the Casualty Company and the Yonkers Bank, the District Court found further support for its holding that the Casualty Company was properly entitled to the fund, in the principle that where the payment is still in the hands of a stakeholder, a completing surety's rights are superior to those of a formal assignee of the contractor since its rights arise at the time of the making of the surety contract. On September 2, 1959, the District Court granted the motion of the Yonkers Bank for reargument and, on reargument adhered to its original opinion.

From the foregoing rulings, the Yonkers Bank, Liberty Mutual and the United States appealed to the Court of Appeals for the Second Circuit but thereafter the United States abandoned its appeal and agreed to its dismissal.

In its decision of April 27, 1961 the Court of Appeals affirmed that part of the judgment which granted summary judgment in favor of the Casualty Company as to Liberty Mutual but reversed that part of said judgment in favor of the Casualty Company as to the Yonkers Bank and remanded the case with directions to enter judgment in favor of the Yonkers Bank in the sum of $47,133.90.

By its order dated August 1, 1961 the Court of Appeals denied the petition of the Casualty Company for rehearing. On September 19th, 1961 said Court granted the motion of the Casualty Company to stay issuance of mandate pending application for a writ of certiorari to this Court provided that it make such application within thirty days.

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In holding that Casey was not in default until it received on June 14 the Comptroller's written notice of his June 13 declaration of default.

2. In holding that prior to the receipt by Casey on July 14 of the City's formal declaration of default, the City had no power to retain the sixth progress payment.

3. In holding that the sixth progress payment had become due to Casey before it received formal notice of the default declaration.

4. In failing to hold that the superior equity of the Casualty Company to the sixth progress payment arose as of October 4, 1955, at the time it executed its performance and payment bonds as surety to the City which was before the assignment to the Yonkers Bank was filed and that by reason of such priority, the equity of the Casualty Company with respect to the involved funds is superior to that of the Yonkers Bank.

5. In granting summary judgment despite the presence of genuine and material issues of fact.

Reasons for Granting the Writ

(a) The Court below failed to apply the applicable rule governing the rights of completing sureties of the contractor as expressed by the Court of Appeals of the State of New York and the Court of Appeals for the Second Circuit.

(b) The Court in its decision of reversal has not applied the rules laid down by this Court in cases involving the rights of completing sureties against an assignee of the contractor.

(c) The principle involved in this case is one of great importance as regards the rights of sureties under bonds guaranteeing the proper performance of building construction contracts with public agencies.

THE FIRST GROUND

The Court of Appeals erred in failing to hold that, in accordance with the applicable decisions of the Court of Appeals of the State of New York and of the Court of Appeals for the Second Circuit, the Casualty Company, both under the terms of the involved contracts and under well established rules of suretyship, is entitled to the involved sum in the amount of $47,133.90.

Inasmuch as the involved contracts between Casey and the City and between Casey and the Casualty Company were executed and performed in New York, New York law is determinative of the issues.

The law in New York governing the claim of the Yonkers bank, as the assignee of Casey, is stated in:

> *Scarsdale National Bank and Trust Company v. United States Fidelity and Guaranty Company*, 264 N. Y. 159.

In the *Scarsdale* decision, supra, in holding under fact similar to those here that a surety's rights of subrogation to moneys earned but unpaid at the time the contractor abandoned the work were superior to those of the assignee of the contractor, the Court of Appeals stated at page 162:

> "After July 10, 1931, when the Cook Contracting Company defaulted, the State could have completed the work and retained all money due t the contractor at the time of the default and apply it to the cost of completion. The deficiency, or loss sustained by the State, would have been an obligation of the bonding company and could have been collected from it by the State. Under these circumstances the assignee would not have been entitled to this sum of $10,746.29. It had no better rights under the contract than the contractor and, if the State, as against the contractor, could apply these earned moneys to the cost of completion, it could do the same thing as against the assignee. In other words, the moneys due at the time of the default, called the earned moneys, could and would be applied by the State in reducing the amount due on the defendant's bond.
>
> Does it make any difference in the application of these earned moneys that the surety company complied with the demand of the State and completed the job at its own expense? Upon what

principle, or, according to what reasoning, would the earned moneys in one instance inure to the benefit of the defendant and not in the other? The answer attempted to be made is, that the assignee-bank's money went into the work and left just so much less to be completed."

The Court continued at page 163:

"The bonding company succeeded to all these rights of the State, under the principle of subrogation. Having completed the work in behalf of the State, it was subrogated to all the rights of the State as against the contractor. This was not a right given to it by the judgment of the court, or arising at the time of the default. It was implicit in its undertaking and agreement with the State. This equitable right of subrogation was created on December 8, 1930, at the time the defendant executed its bond as surety to the State months before the assignment to the bank. The bond was linked up to the contractor's contract. The performance, which was guaranteed, was the performance of this contract, which had in it the right of the State to apply earned moneys toward completion. Probably the same rights would have existed if article XXII, above quoted, had not been in the contract. However, we are here dealing with the contract which contained the right to retain earned moneys and apply them on the cost of any completed work. To all rights under this contract the bonding company was subrogated. The equity in favor of the surety company *arose* at the time of the giving of its bond. The right *became available* when the surety company com-

pleted the work at a loss. (*Prairie State Bank* v. *United States*, 164 U.S. 227, at pp. 232, 237, 240.) The equitable lien arose at the time of the execution of the bond and was thus superior to the assignment. (*Exchange State Bank* v. *Federal Surety Co.*, 28 Fed. Rep. (2d) 485, 488.) This is the reasoning and the rule adopted by the weight of authority. (*Maryland Casualty Co.* v. *Board of Water Comrs.*, 66 Fed. Rep. (2d) 730, and *Lacy* v. *Maryland Casualty Co.*, 32 Fed. Rep. (2d) 48; as well as the case of *Prairie State Bank* v. *United States*, 164 U.S. 227; *Henningsen* v. *U. S Fidelity & Guaranty Co.*, 208 U.S. 404; *Hardaway* v. *National Surety Co.*, 211 U. S. 552.) We held nothing to the contrary in *Arrow Iron Works, Inc.* v. *Greene* (260 N.Y. 330) and *Laski* v. *State* (217 App. Div. 420; affd., 246 N.Y. 569)."

Despite the clear applicability of the *Searsdale* decision, supra, to the issues here presented, the Court of Appeals in its opinion of reversal has not applied the principle expressed by the New York Court of Appeals in this leading decision.

In *Stanton* v. *Baker-Comeau & Co., Inc.*, 168 Misc. 190 at 200, aff'd. 260 App. Div. 831, leave to appeal denied 260 App. Div. 980, the court specifically held that in the *Searsdale* case the Court of Appeals determined that the completing surety was fully subrogated to all of the rights of the State as against the contractor and that under *Searsdale* it was held that moneys earned and unpaid at the time the contractor abandoned its work, as well as retained percentages, were properly directed to be paid to the surety which completed the work at a loss.

See also:

> *United States Fidelity and Guaranty Company* v. *Triborough Bridge Authority*, 297 N.Y. 31.

In the *United States Fidelity and Guaranty Company* decision, supra, a contractor, as principal, and plaintiff, as surety, executed a bond in the form required by a contract for the construction, for defendant Triborough Bridge Authority, of a public improvement, and conditioned upon the contractor's payment of all claims for labor and materials furnished. At the time the completed work was accepted by defendant authority, the contractor was in default as to moneys owing the subcontractors for labor and materials and plaintiff surety thereupon satisfied such unpaid claims. The Court held that under principles of subrogation the surety succeeded to the right of the Authority, as owner, against the contractor to withhold money due the contractor and to apply it in payment of the unsatisfied claims for labor and materials. Such equity in the surety's favor arose at the time it gave its bond and the right became available and enforceable when it carried out the provisions of the contract. In so holding the Court of Appeals of the State of New York stated at page 35:

> "The conclusion of the courts below—that the surety's rights are prior to those of the intervener—is in accord with settled law. (See e.g., *Scarsdale Nat. Bank & Trust Co.* v. *United States Fidelity & Guar. Co.*, 264 N.Y. 159; *Prairie State Bank* v. *United States*, 164 U.S. 227; *American Surety Co.* v. *Sampsell*, 327 U.S. 269.) Plaintiff succeeded—under principles of subrogation—to

all rights which defendant Authority might have against the contractor, including that of withholding money due the contractor and of applying it to the payment of unsatisfied claims for labor and materials furnished."

At page 37 the Court continued:

"In addition, it is, of course, settled that intervener's rights to the moneys held by defendant Authority can be no greater than those which its taxpayer—the contractor—had. (*Karno-Smith Co.* v. *Maloney*, 112 F. 2d 690, 692; Internal Revenue Code §3670; U.S. Code, tit. 26, §3670.) Here the contractor's rights to the fund were clearly subordinate to the right of defendant Authority—and, by subrogation, of plaintiff—to withhold and apply those moneys to the payment of unsatisfied claims for labor and materials. So long as such claims were outstanding and unpaid and so long as defendant Authority had the right to withhold and apply, the contractor had no rights to the fund, and, consequently, had no property interest therein upon which intervener could place a lien."

Following the *United States Fidelity and Guaranty Company* decision, supra, the Court of Appeals of the State of New York again held the surety to be entitled to the fund in

Aetna Casualty & Surety Company v. *United States of America*, 4 N.Y. 2d 639.

In the *Aetna* decision Chief Judge Conway said at pages 644-645:

"The law of the *Triborough* case, followed in

other cases, is well-settled law. (See *Scarsdale Nat. Bank & Trust Co.* v. *United States Fidelity & Guar. Co.*, 264 N.Y. 159, 163-164; *Matter of United States Cas. Co.* v. *Met. Contr. Corp.*, 11 Misc. 2d 492; *Matter of (Amer.) Lumbermen's Mut. Cas. Co.* v. *Great Atlantic Constr. Corp.*, 11 Misc. 2d 491; *Fidelity & Deposit Co.* v. *New York City Housing Auth.*, supra, pp. 144, 146; *Vincent* v. *Matthews Co.*, 126 F. Supp. 102; *Alabama-Tennessee Natural Gas Co.* v. *Lehman-Hoge & Scott*, 122 F. Supp. 314; *Royal Ind. Co.* v. *United States*, 93 F. Supp. 891, 899; *Matter of Cummins Const. Corp.*, 81 F. Supp. 193, 196-197.) The net effect of these cases is that Horticultural had no interest in the funds presently held by the Authority to which the tax lien could attach. Consequently inasmuch as Aetna's losses far exceed the funds held by the Authority, it was entitled to recover the full unpaid balance of the contract price—(1) $9,444.02 on the Berry project, and (2) $1,860.75 on the Patterson Project. The United States is entitled to nothing out of these funds."

It is noted that the Court of Appeals, in holding that the City did not have the right to retain the sixth partial payment, assumed that only Articles 45 and 48 of the contract are applicable to the involved situation. Consequently it appears that the Court paid no attention to Articles 12, 16, and 23 each of which authorizes the City under certain conditions to retain moneys due the contractor. Petitioner submits that the failure of the Court to consider the above numbered Articles seriously prejudiced its case and that this oversight by the Court furnishes further grounds for review by this Court.

Also, it is noted that in referring to the certificate required under section 220-a of the New York Labor Law the Court of Appeals held that the City had never demanded that Casey file such a statement and that its failure to do so constituted a waiver of its right to withhold payment until such a statement was furnished.

It is the contention of your petitioner that the Court clearly erred in finding a waiver in that section 220-a is mandatory since it states that it shall be the duty of the Comptroller to require the contractor to file the statement in writing and that accordingly the City lacked the power to waive the certificate required under section 220-a.

In this connection the well settled law in New York is that when the act to be done concerns either the public interest or the rights of third persons (as in the instant case), permissive words in a statute will be construed as mandatory.

> *Vulcan Rail & Constr. Co., Inc.* v. *County of Westchester*, 250 App. Div. 212 at 220;
> *People ex rel. Cayuga Nation* v. *Land Comrs.*, 207 N.Y. 42;
> *People ex rel. Doscher* v. *Sisson*, 222 N.Y. 387.

Certainly the opinion of reversal is inconsistent with the effect of the above cited decisions and is erroneous in finding the presence of a waiver as the City is actually without power to waive the statutory requirements of Section 220-a.

In a recent decision the Supreme Court of the State of New York had occasion to consider and decide whether the holding by the district court in the instant case was in accordance with the law of New

York. It agreed that such was the fact "beyond debate".

> *State Bank of Albany* v. *Dan-Bar Contracting Co., Inc.*, 23 Misc. 2d 487, Affd. 12 A.D. 2d 416.

In the *State Bank* case, supra, Mr. Justice Bookstein stated at page 495:

> "*First National Bank* v. *City of New York* (177 F. Supp. 175) presented the precise question determined in the *Scarsdale* case (supra) and followed it. The case was one where the surety completed the project under the performance bond at a cost greatly in excess of the balance due on the contract. The court held that the surety, under the subrogation doctrine, had priority to the unpaid balance due the contractor over the bank which had an assignment from the contractor as well as over some other asserted liens and claims, including a Federal tax lien. *The soundness of the determination in that case is beyond debate.*" (Emphasis added.)

The Decisions of the Court of Appeals for the Second Circuit Which We Consider Are Contrary to the Instant Decision

> *Fidelity and Deposit Company of Maryland* v. *New York City Housing Authority*, 241 Fed. 2d 142 (2nd Cir. 1957);
>
> *Massachusetts Bonding and Insurance Company and United States of America* v. *State of New York, In re Fago Construction Corporation*, 259 Fed. 2d 33 (2nd Cir. 1958).

While these two cases involved the matter of the priority of the Government lien the principles enunciated in each case is controlling here, i.e., that the highest Court of the State of New York has determined that a failure to pay laborers and materialmen is a breach of contract, a contractor who fails to make such payments has no right under the contract and a surety company which pays such laborers and materialmen under principles of subrogation is entitled to a prior claim against traceable portions of progress payments which might be made by an owner to a contractor after the surety commences supervising the contractor's operations which work was ultimately completed by the surety.

THE SECOND GROUND

The Court below has decided the issues in a way in conflict with the decisions of this Court.

The Court in its decision of reversal herein has not applied the rules laid down by this Court in cases involving the right of completing sureties against an assignee of the contractor.

> *Henningsen* v. *United States Fidelity & Guaranty Co.*, 208 U.S. 404;
> *Prairie State National Bank* v. *U.S.*, 164 U.S. 227.

Thus in the *Henningsen* decision, supra, this Court held that the surety on the bond of a public contractor conditioned for the faithful performance of a contract, and the prompt and full payment of laborers

and materialmen, has an equity, under the doctrine of subrogation, in the sums due from the government under the contract, which is superior to the claim of a bank under an assignment from the contractor to secure the repayment of money loaned.

Moreover as assignee under its blanket indemnity agreement executed on October 21, 1954, the Casualty Company takes priority over the assignment to the Yonkers Bank (which assignment was executed February 7, 1956) because its assignment was first in time and therefore first in right.

Salem Trust Co. v. *Manufacturers Finance Co.*, 264 U.S. 182 and
Lacy v. *Maryland Casualty Co.*, 32 F. 2d 48.

In the *Lacy* decision, supra, it was held at page 51:

> "The question arises whether this superior equity of the surety extends to the current estimates payable under the contract or merely to the retained percentage. We think that it extends to both. The equity arises because of the obligation of the surety to perform the contract of the principal. Upon his performance of this contract, equity subrogates him to all rights of the obligee as against the principal. Now the obligee, upon default of the principal, is without doubt entitled to apply all moneys unpaid towards the performance of the contract, ignoring any assignments by the principal; and it necessarily follows that the surety upon performing the contract, being subrogated to the rights of the obligee, is entitled to the moneys unpaid so far as necessary to reimburse his loss."

This principle of priority was certainly overlooked by the Court of Appeals in its decision reversing the trial court and should be corrected by this Court.

THE THIRD GROUND

The principles involved in this case are of great importance in so far as the rights of a completing surety as opposed to those of an assignee are concerned and should be settled by this Court.

As seen from the above-cited decisions, it has long been the established rule in New York that under the subrogation doctrine a completing surety possesses an equity in the unpaid balance due the contractor superior to that of a subsequent assignee. Accordingly, sureties generally have relied upon this principle in extending their bonds to contractors engaged in the construction of public improvements.

The decision of the Court of Appeals would in a great many instances deprive sureties of the protection which they have enjoyed under the law prior to said decision. Said decision would therefore have a highly disturbing effect as regards the relationship of surety and principal; and, by depriving the surety of a position which it heretofore enjoyed, and by thus increasing its risk in the event of the principal's default, would result in the surety being required to charge higher premiums on performances and payment bonds issued in connection with work on public contracts. These increased premiums would have to be passed on to the public agencies involved in the form of higher bids. Thus the public would be pay-

ing more for improvements than otherwise necessary. Certainly this is contrary to the public interest. A decision which accomplishes such a undesirable result by reasoning which is at variance with decisions of the highest court of the State of New York and of this Court, warrants review by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

FRANKLIN NEVIUS,
Attorney for Petitioner.

Of Counsel
EMIL V. PILZ
J. EDWARD DAVEY, JR.

Dated: October 17, 1961

APPENDIX A

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of April one thousand nine hundred and sixty-one,

Present: HON. J. EDWARD LUMBARD,
Chief Judge,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
Circuit Judges.

FIRST NATIONAL BANK IN YONKERS,
Plaintiff-Appellant,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant-Appellant,

THE CITY OF NEW YORK, WM. CASEY & SONS, INC., (et al.),
Defendants,

UNITED STATES OF AMERICA,
Defendants.

Appeal from the United States District Court for the Southern District of New York.

Judgment of Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed that that part of the judgment of said District Court in favor of Maryland Casualty Company be and it hereby is affirmed as to Liberty Mutual Insurance Company.

It is further ordered that that part of the judgment in favor of Maryland Casualty Company be and it hereby is reversed as to First National Bank in Yonkers and that the action be and it hereby is remanded with directions to enter judgment in favor of the First National Bank in Yonkers in the sum of $47,133.90 in accordance with the opinion of this court; with costs to plaintiff-appellant.

A. DANIEL FUSARO
Clerk

APPENDIX B

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 80—October Term, 1960.

(Argued November 14, 1960 Decided April 27, 1961.)

Docket No. 26028

FIRST NATIONAL BANK IN YONKERS,
Plaintiff-Appellant,

—v.—

MARYLAND CASUALTY COMPANY,
Defendant-Appellee,

THE CITY OF NEW YORK, WILLIAM CASEY & SONS, INC., UNITED STATES OF AMERICA, CHARLES H. HANSON, CHARLES W. GRANT, JAMES MARTIN, ROBERT M. JOHNSON, As Trustees of the New York City Carpenters' Welfare & Pension Fund,
Defendants,

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant-Appellant.

Before:

LUMBARD, *Chief Judge*,
WATERMAN and MOORE, *Circuit Judges*.

Plaintiff commenced an action in the District Court for the Southern District of New York, John M. Cashin, *J.*, to recover payments allegedly due to it

upon a construction contract to its assignor, the contractor who had defaulted upon the contract. Defendant Maryland Casualty Company's motion for summary judgment was granted and plaintiff and defendant Liberty Mutual Insurance Company appeal.

The summary judgment in favor of Maryland Casualty Company is reversed as to plaintiff and affirmed as to the Liberty Mutual Insurance Company; the case is remanded with directions to enter judgment in favor of the First National Bank in Yonkers.

GERALD M. SMITH, New York, N. Y. (Samuel Gottesman, New York, N. Y., on the brief), *for plaintiff-appellant.*

EMIL V. PILZ, New York, N. Y. (Nevins, Jarvis & Pilz, New York, N. Y., on the brief), *for defendant-appellee.*

RAYMOND GITLIN, New York, N. Y. (Benjamin Rosen, New York, N. Y., on the brief), *for defendant-appellant.*

LUMBARD, *Chief Judge*:

This case arises out of the breach by William Casey and Sons, Inc., of its contract to construct sewers in Bowery Bay for the City of New York. The City has been satisfied since The Maryland Casualty Company, appellee herein, completed the sewers pursuant to its bond guaranteeing Casey's performance. Involved in this appeal are the competing claims of the First National Bank in Yonkers, the Maryland Casualty

Company and the Liberty Mutual Insurance Company to $47,133.90, held by the City, and attributable to work done by Casey and approved for payment by the City Engineer before Casey had been formally declared in default.

An action to recover $47,133.90 was brought in the Supreme Court of New York County by appellant, the First National Bank in Yonkers, which, prior to Casey's breach, had allegedly received an assignment of all money due or to become due under the contract. Joined as defendants were: the City, Casey, the Casualty Company, four individuals as trustees of the New York City Carpenters' Welfare & Pension Fund, the Liberty Mutual Insurance Company and the United States of America.[1] The case was removed to the district court by the United States acting pursuant to 28 U. S. C. §1444 and §2410.

Casey made no answer to the complaint and the trustees, who held an unsatisfied judgment against Casey for welfare and pension contributions, moved to dismiss the complaint. The United States, the Casualty Company and Liberty Mutual filed cross-claims against the City in which they demanded the $47,133.90 or some portion of it. The United States alleged that the money was owing to Casey but that Casey, in turn, was liable to it for $110,390.83 in taxes withheld from wages paid at the construction project. Liberty Mutual, asserting that it was entitled to be paid $39,903.24 owed it by Casey in premiums for workman's compensation insurance at the project,

[1] The parties will be referred to throughout as the Yonkers Bank, or occasionally the Bank, the City, Casey, the Casualty Company, the trustees, Liberty Mutual and the United States.

claimed that the Casualty Company had a cause of action for the money but in turn was liable to it upon the surety bond that guaranteed Casey's payment for "services rendered." The Casualty Company, which also sought certain other funds in the City's possession,[2] contended that it was entitled to the fund by reason of the $682,637.52 loss it sustained in completing the contract. The City admitted that it held the money but stated that it knew not who was entitled to it.

After their answers, the United States and the Casualty Company moved with supporting affidavits for summary judgment. The motion of the Casualty Company was granted and that of the United States denied. From these rulings, the Bank, Liberty Mutual and the United States appealed but thereafter the United States abandoned its appeal and agreed to its dismissal.

I.

The construction contract between Casey and the City and the Casualty Company's surety contract guaranteeing Casey's performance were entered into in October of 1955. On February 7, 1956, after working on the project for at least two months, Casey assigned to the Yonkers Bank "all money * * * due or to become due" under the contract in exchange for "$1 and other valuable consideration." The Yonkers Bank made continual advances to Casey of which it has not been repaid $50,000, owing since May 10, 1956.

[2] These other funds are not before us. Judge Cashin dismissed the Casualty Company's claim for them as premature and no appeal was taken from that portion of Judge Cashin's order.

Sometime during the middle of May, Casey met with financial difficulties which the Casualty Company attempted to alleviate by advancing funds, allegedly $57,993.91, to cover Casey's payroll and purchase of necessary materials. The Casualty Company's aid, however, was apparently not sufficient because Casey suspended operations at the project sometime before June 4, 1956. Two days later, on June 6, the Commissioner of the City's Department of Public Works demanded that Casey show cause why it should not be held in default. Pursuant to this notice, hearings were held on June 11 and June 13, and on the latter occasion, the Commissioner formally declared Casey to be in default. The district court held, however, that Casey's rights to further payment ceased on June 6, 1956, when he was "legally" in default and that the City was entitled to retain the $47,133.90, since under no theory had the $47,133.90 become payable to Casey by June 6, and granted summary judgment to the Casualty Company which was subrogated to the City's rights by virtue of having completed the contract at a loss.[3] *Scarsdale National Bank & Trust Co. v. United States Fidelity & Guaranty Co.*, 264 N. Y. 159 (1934).[4] In so holding the trial court was in error.

[3] The Casualty Company is also subrogated to Casey's rights. If the money at issue was due to Casey despite his default, and if Casey was liable to the Yonkers Bank on the assignment, however, this is of no value to the Casualty Company since all money due to Casey was payable to the Yonkers Bank.

[4] New York law is determinative of the issue. The sewers were to be built in New York and payment was to be made from the office of the Comptroller of the City of New York.

The question of the applicable law in a case of this sort when the United States Government is claiming a tax lien is not before us. Compare *Fidelity & Deposit Co. of Maryland v. City of New York*, 241 F. 2d 141, 145 (2d Cir. 1957).

Opinion of Court of Appeals

An analysis of the contractual provisions and the documentary evidence leads us to the conclusion that the sixth progress payments was payable to Casey and, hence, to the Yonkers Bank by assignment before the City acquired any right of retention. We hold that the City had no power to retain funds on account of Casey's default, and that the $47,133.90 had become due to Casey before it received notice of the default declaration. Finally, we hold that if the assignment by Casey to the Yonkers Bank was valid, the City had no power under Article 48 of the construction contract —which gave the City the power, after the contractor's default, to retain "such monies as would have been payable to the contractor if he had completed the work * * *"—or otherwise to withhold from the Yonkers Bank money that was payable to Casey before the default declaration. Since the Bank had advanced $50,000 to Casey which was unpaid, we remand the case with directions to enter judgment for the bank in the sum of $47,133.90.

II.

We must deal first with the preliminary question of whether Casey's failure to file a statement required by Article 41 of the contract setting forth the wages owing to his laborers freed the City from any obligation to pay the progress payments. We hold that it did not. Though it is conceded that Casey failed to file such a statement, the City never demanded that Casey do so.[5] Therefore, we agree with the Bank that

[5] The City's answer and its Chief Auditor's description of the Comptroller's records state that payment was withheld because Casey defaulted. Their failure to add that the money was withheld because Casey had not complied with §220(a) of the New

since the City had ample time to demand the statement, its failure to do so constituted a waiver of its right to withhold payment until such a statement was furnished.

III.

We now turn to our conclusion that the sixth progress payment of $47,133.90 had become payable to Casey before it received notice on June 14.

Shortly after May 15, 1956, Casey submitted a requisition for work done prior to that date. The City Engineer approved the requisition as required and prepared a voucher for the approval of the Commissioner of Public Works. By May 28, 1956,[6] the Deputy Commissioner of Public Works[7] approved a voucher for $47,133.90. The contract then required the Deputy Commissioner to file the voucher with the Comptroller and provided that "payment * * * less any and all deductions authorized to be made by the Comptroller * * * will be made by the

York Labor Law, referred to in Article 41, can indicate only that the City had not insisted that it do so.

The Casualty Company's answer, which relied heavily upon Casey's failure to file the wage information, was filed on September 26, 1958, long before the City filed its exhibit, dated December 24, 1958 or its answer, dated January 6, 1959. Therefore, the Casualty Company cannot contend that the City would not have thought of mentioning the ground for retention of money that is here discussed.

[6] The Yonkers Bank claimed that the voucher was approved on May 23, 1956. An affidavit for the City is ambiguous but seems to say that May 28, 1956 is the correct date. The difference is not material to the issues in this case.

[7] The fact that action was taken by the Deputy Commissioner rather than the Commissioner we do not believe to be of significance. Cf. *Jay* v. *Boyd*, 351 U. S. 345 (1956); *Kimm* v. *Rosenberg*, 363 U. S. 405, 408 (1960).

Comptroller within fifteen (15) days after the filing of such voucher in his office." The approved voucher was forwarded to the Comptroller's office by the Deputy Commissioner on May 28, 1956, and according to the City the voucher was received and filed on May 29, 1956.[8]

Therefore, the City was under an obligation to make the payment approved by the voucher "less any and all deductions authorized to be made by the Comptroller" within fifteen days from May 29, the date the City claims the voucher was filed. This period expired at the end of the fourteenth day, June 12.

But Casey was not in default until it received on June 14 the Comptroller's written notice of his June 13 declaration of default.

Significant is the City's use of the word "declare" in Articles 45 and 48 of the contract. Article 45 covers the "Commissioner's Right to Declare Contractor in Default." After listing various grounds for default, a procedure is specified whereby before exercising "his right to declare the Contractor in default" he shall give the Contractor an opportunity to be heard on two days' notice. Under Article 48 "after declaring the Contractor in default," the Commissioner was entitled to have the work completed by other means and then charge the expense of such completion against "monies as would have been payable to the Contractor if he had completed the work."

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[8] We credit the City's specific allegations on this point, rather than the unsupported assertions of the Bank that the voucher was received by the Comptroller on May 28. Cf. *De Luca* v. *Atlantic Refining Co.*, 176 F. 2d 421, 423 (2d Cir. 1949), cert. denied 338 U. S. 943.

Default thus was not to be objectively determined by an act or failure to act but only by a declaration by the Commission after a hearing.

Accepting the dictionary and common meaning of "declare" as "To make known explicitly, esp. by language; to communicate clearly to others, whether by acts, words, writing or signs; to publish; announce;" (Webster, New International Dictionary, 2nd Ed. unab.), the method chosen by the City to make its decision known was by letter to Casey. The letter dated June 13 itself states that the explanations offered by Casey in the hearings of June 11 and 13 were not acceptable and that "Under the circumstances, therefore, you are hereby notified that you are declared in default * * *" The letter further stated "*Upon receipt of this notice* you shall immediately discontinue all further operations under this contract and shall immediately quit the site leaving untouched all plant materials, equipment, tools, and supplies now on the site." [Emphasis supplied] The plain meaning of these words is that notice to Casey is intended and that such notice is to be given "hereby," i.e. by the letter; "notice" and "notify" by root derivation and accepted usage contemplate knowledge which could be obtained only by receipt of the June 13 letter. Thus, the City in practice showed that a state of default was to be declared by a notice which the City chose to give in written form.

As we have said, the payment voucher dated May 28 was filed on May 29. Although the record does not disclose when the June 13 letter was received by Casey, the letter must have been written and mailed after the hearing on June 13. Assuming a mail transit

period of a day, notice of default would not have been received until June 14.

IV.

We now turn to consider whether the City had any right under Article 48 of the contract or otherwise to retain money that had become due and payable before default. We conclude that it did not.

Article 48 gave the City the power to retain "such monies as would have been payable to the Contractor if he had completed the work." We do not think this covered the sixth progress payment. The language "[money that] would have been payable" does not include money that had already become payable, as had the sixth progress payment.

There are two other funds to which Article 48 would apply for the protection of the City after Casey's default: first, $60,434.60 which represented 5% of what had been earned by Casey prior to its default and which the City was permitted to retain from progress payments until satisfactory completion of the contract, and second, the City could retain $9,715.24, which had been earned by Casey prior to default but which had not become payable under Article 41's procedure as outlined above.

The cases upon which the Casualty Company relies to support its claim that the contract gave the City power to retain the sixth progress payment are all distinguishable. In each case, the contract involved explicitly gave the party in the position of the City the right to retain all money in its possession includ-

ing money that was due and payable to the party in Casey's position. See *Scarsdale National Bank & Trust Co.* v. *United States Fidelity & Guaranty Co.*, 264 N. Y. 159, 162 (1934) ["'such moneys as may be due or may at any time thereafter grow due * * *'"]; *United States Fidelity & Guaranty Co.* v. *Triborough Bridge Authority*, 297 N. Y. 31, 34 (1947) ["The contract * * * provided * * * [that the] Authority should have the right to withhold * * * any payments due the contractor * * *"][9] *Aetna Casualty & Surety Co.* v. *United States*, 4 N. Y. 2d 639, 643 (1958) ["Partial payments could be withheld * * * if [the party in the City's position] felt that work was not progressing satisfactorily"]. Cf. *Slattery* v. *National Commercial Bank & Trust Co.*, 247 App. Div. 221 (Third Dept. 1931).

Indeed, the fact that this contract did not specifically give the City power to withhold funds that had become payable when other contracts, one involving the City of New York,[10] have explicitly provided for such power, is further support for our conclusion. *People* v. *Continental Casualty Co.*, 157 Misc. 15, 22-23 (Sup. Ct. Albany Cty., 1935); cf. *American Radiator Co.* v. *City of New York*, 223 N. Y. 193 (1918).

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[9] The language quoted in Judge Fuld's paraphrase of the contract, the precise language of which is not set forth in his opinion or in the opinions below. See 48 N. Y. S. 2d 16 (S. Ct. N. Y. Cty.); 269 App. Div. 978 (First Dept.).

[10] One of the parties to the contract in *Aetna Casualty*, *supra*, was the New York Housing Authority.

V.

Although the Yonkers Bank did not move for summary judgment, this court may direct the district court to enter summary judgment if all the issues were before the district court and no material issue of fact is disputed. See 6 Moore Federal Practice, para. 5612; compare *Fountain* v. *Filson,* 336 U. S. 681 (1949). On the record we find no material issues of fact.

VI.

Finally, we must briefly consider Liberty Mutual's appeal. We think that Liberty Mutual's cross-claim, based upon Casey's alleged failure to pay insurance premiums, should not prevail in this action irrespective of whether the Yonkers Bank or the Casualty Company has a right to the fund. Liberty Mutual did not file a lien until after the payment had become payable to Casey. Therefore, its claim is inferior to the Yonkers Bank which was entitled to the fund as soon as it became payable to Casey.

We reverse the award of summary judgment and remand the case with directions to enter judgment for the Bank in the sum of $47,133.90.

APPENDIX C

Section 220-a of New York Labor Law provides as follows:

> "Before payment is made by or on behalf of the state or of any city, town, village or other civil division of the state of any sum or sums due on account of a contract for a public improvement it shall be the duty of the comptroller of the state or the financial officer of the municipal corporation or other officer or person charged with the custody and disbursement of the state or corporate funds applicable to the contract under and pursuant to which payment is made to require the contractor and each and every subcontractor from the contractor of a subcontractor to file a statement in writing in form satisfactory to such officer certifying to the amounts then due and owing from such contractor or subcontractor filing such statement to or on behalf of any and all laborers for daily or weekly wages or supplements on account of labor performed upon the work under the contract, setting forth therein the names of the persons whose wages or supplements are unpaid and the amount due to each or on behalf of each respectively, which statement so to be filed shall be verified by the oath of the contractor or subcontractor as the case may be that he has read such statement subscribed by him and knows the contents thereof, and that the same is true of his own knowledge. As amended L. 1956, c. 750, § 2, eff. April 1, 1956."

SUPREME COURT, U. S.

FILED

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JOHN F.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 507

MARYLAND CASUALTY COMPANY,

Petitioner,

against

FIRST NATIONAL BANK IN YONKERS,

Respondent,

and

THE CITY OF NEW YORK WILLIAM CASEY & SONS, INC., UNITED STATES OF AMERICA, CHARLES H. HANSON, CHARLES W. GRANT, JAMES MARTIN, ROBERT M. JOHNSON, as Trustees of the New York City Carpenters' Welfare & Pension Fund, and LIBERTY MUTUAL INSURANCE COMPANY,

Defendants

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

SAMUEL GOTTESMAN,
Attorney for Respondent,
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Of Counsel

SAMUEL GOTTESMAN
GERALD M. SMITH

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In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 507

Maryland Casualty Company,

Petitioner,

against

First National Bank in Yonkers,

Respondent,

and

The City of New York, William Casey & Sons, Inc., United States of America, Charles H. Hanson, Charles W. Grant, James Martin, Robert M. Johnson, As Trustees of the New York City Carpenters' Welfare & Pension Fund, and Liberty Mutual Insurance Company,

Defendants.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

Facts

Casey's all moneys assignment to Yonkers Bank on February 7, 1956 of "all money or moneys due or to become due" Casey under its contract with the City (10a-13a) was in full conformity with Section 25 of the Lien Law of the State of New York (64a) and contained the

trust fund provision required by the Lien Law, Article 2, Section 25, Subdivision 5 thereof (11a). It was duly approved by the City on the day of its execution (64a), and was duly and timely filed as prescribed by the Lien Law of the State of New York (64a).

Prior to the said assignment the City made two progress or partial payments under the contract to Casey (74a). After said assignment became effective, the City made three more partial payments under the contract to Yonkers Bank as Casey's all moneys assignee (74a-75a).

The validity of the assignment, as such, has never been challenged on any ground.

Casey owed Yonkers Bank, on and after May 10, 1956, $50,000 for advances made upon the assignment, which Casey never repaid (64a). That indebtedness has never been challenged.

After the City, by its letter of June 13, 1956, declared Casey in default (143a-145a) the following moneys and categories of moneys were held by the City applicable to the Casey contract (131a-132a, 133a):

1. $47,133.90—Estimate No. 6—moneys earned by Casey under the contract for work up to May 15, 1956 and certified by the City, prior to default, to be due and payable under the contract to Yonkers Bank as Casey's assignee.

2. $9,715.24—Estimate No. 7—moneys earned by Casey prior to default but not certified by the City prior to default to be due and payable.

3. $60,434.60—retained percentages—the total of the moneys retained out of each partial payment, but not due or payable until satisfactory completion of the contract.

(The City also held, of course, the remaining balance in contract.)

This case, and the judgment directed to be entered by the Court of Appeals in favor of respondent, involves only the first category of moneys above—the $47,133.90 (Sixth Estimate) certified by the City prior to default to be due under the contract and to be due and payable to Yonkers Bank as Casey's all moneys assignee.

The City, though at all times admitting that the sixth partial payment was certified and due and payable (129a), failed to make the payment to Yonkers Bank prior to default, as it should have.

This case does *not* involve any of the other moneys set forth above, namely, retained percentages of $60,434.60, or money earned by the Contractor before default of $9,715.24 but never certified by the City prior to default, or the balance in contract.

The Court of Appeals, in reversing summary judgment granted below in favor of the Casualty Company, and in remanding with directions to enter judgment in favor of Yonkers Bank, held that, under a proper construction of the terms of the City-Casey contract and the documentary evidence, the City had no right to withhold the payment of the Sixth Estimate in the sum of $47,133.90 which was due and payable before the effective date of Casey's default, and should have paid the same to Yonkers Bank, as Casey's all moneys assignee (290 F. 2d 246, at 249).

The Question Presented

Did the Court of Appeals correctly hold that Yonkers Bank, under its all moneys assignment, was entitled to the Sixth progress payment of $47,133.90, certified by the City prior to default to be due and payable to Yonkers Bank, to the exclusion of any right therein on the part of the Casualty Company?

The Reasons Why the Application for the Writ Should Be Denied

1. The Casualty Company's blanket indemnity agreement and the assignment therein contained was not the ground upon which it staked its case below, and, in any event, was absolutely void as to Yonkers Bank (78a-80a and Appendix 1 hereto).

2. It is fundamental that, as subrogee of the City, the Casualty Company's rights can rise no higher than those of the City—no higher than the rights reserved by the City in its contract with Casey. Article 48 (38a-39a) governed whatever rights the City had to retain and withhold money following the declaration of default by it pursuant to Article 45 (36a-38a) of the City-Casey contract and gave the City the power to retain "only such monies as would have been payable to the Contractor if it had completed the work" (39a). The Court of Appeals correctly held that the power of retention governed by Article 48 did not cover the Sixth progress payment so that the City had no power to retain money under that Article which it had certified, prior to default, to be due and payable to Yonkers Bank.

3. The holding of the Court of Appeals, under the terms of the City-Casey contract, is strictly in accord with principles of suretyship law established by applicable decisions of the courts of the State of New York and of the Lien Law of the State of New York.

The Casualty Company rested its case below squarely upon the principle of subrogation (40a), claiming that it is subrogated to all the rights of the City as against Casey and anyone claiming under Casey and upon the equitable doctrine of relation back (to the date of its bonds) after default (40a).

The holding of the Court of Appeals is strictly in accord with New York case law as to the importance of contract terms in determining the scope of the owner's right to withhold (and hence the surety's subrogated right thereto) upon the contractor's default, and as to the distinctions in the kinds of moneys involved in applying the subrogation doctrine.

> *Schuessler* v. *Metropolitan Casualty Insurance Company of New York*, 265 N. Y. 648 (1934);
> *American Radiator Co.* v. *City of New York*, 223 N. Y. 193 (1918);
> Cf., *Slattery* v. *National Commercial Bank & Trust Co.*, 247 App. Div. 221 (1936);
> *State Bank of Albany* v. *Dan-Bar Contracting Co., Inc.*, 12 A. D. 2d 416 (March, 1961).

In *State Bank of Albany, supra,* the Appellate Division, in sustaining the priority of the Contractor's all moneys assignee over the claims of Maryland Casualty Co., as subrogated surety, said at page 418:

> "Cases which have determined the surety's rights to be superior have turned upon the express contractual right of the obligee to resort to the withheld funds for one purpose or another; * * *"

While the petition quotes from the opinion of the lower court in *State Bank of Albany, supra,* and particularly that court's characterization of the category of moneys involved in the instant case, it is obvious that the citation of the instant case (in the lower court's reference thereto in the *State Bank of Albany* case) is to the decision of the District Court and not to the Court of Appeals. It is equally obvious that the lower court in the *State Bank of Albany* case misconstrued the nature of the moneys involved in the instant case because it referred to the same as "the unpaid balance due the contractor"—which

was the only category of moneys involved in the *State Bank of Albany* case. Here, the only category involved is the Sixth Estimate certified by the City, prior to default, as payable to Yonkers Bank as assignee of Casey.

Insofar as this case involves only moneys certified before default to be due and payable—the Sixth Estimate—it is governed by *People* v. *Continental Casualty Company*, 157 Misc. 15 (1935)—decided one year after *Scarsdale National Bank and Trust Company* v. *United States Fidelity and Guaranty Company*, 264 N. Y. 159 (1934). It was held in *People* v. *Continental Casualty Company, supra*, that as to moneys certified to be due prior to default, mechanic's liens filed prior to default attached thereto and, in view of the contract terms there employed by the City, the subrogated surety had no right to such certified moneys, the City having reserved its right only with respect to the retained percentages.

The rights of assignees and mechanic's lienors are equally governed by the same Section of the Lien Law of the State of New York—Section 25—the pertinent provisions of which are set forth in Appendix 2 hereto.

4. As pointed out by the Court of Appeals in its opinion herein, the New York cases relied upon by the Casualty Company are all distinguishable. The Court said, 290 F. 2d 246 (1961), at page 251:

> "• • • In each, case the contract involved explicitly gave the party in the position of the City the right to retain all money in its possession including money that was due and payable to the party in Casey's position. • • •"

Stanton v. *Babor-Comeau & Co., Inc.*, 168 Misc. 190 (1938), affd. 260 App. Div. 831 (1940), leave to appeal denied 260 App. Div. 980 (1940), relied upon by petitioner here (but cited for the first time in its petition

for rehearing to the Court of Appeals), did not involve anything more than retained percentages and the uncertified balance in contract following the contractor's default. It did not involve the separate category of moneys (here involved) certified to be due and payable prior to default. There was there involved a State of New York contract which, having been cancelled by the State, expressly gave it the power thereupon to apply "any funds retained" (the retained percentages) toward the completion of the contract.

5. The Court of Appeals correctly ruled that Casey could be defaulted only by the City's following the procedures set forth in Article 45 (the default clause) with the result that the City's declaration of default, communicated by letter of June 13, 1956, did not become effective until June 14, 1956. Correct, also, was the further ruling of the Court of Appeals that the Sixth certified Estimate was due and payable to Yonkers Bank under the contract before the default became effective.

Articles 13, 16 and 23 of the City-Casey contract, referred to in the petition herein, were no part of the record on the motion for summary judgment in the District Court and were raised for the first time by the Casualty Company in its petition for rehearing to the Court of Appeals. They clearly do not relate to the specific issue of the Sixth certified Estimate here involved, and the Court of Appeals obviously agreed by its denial of the petition for rehearing.

6. The Court of Appeals correctly held that the failure of the City to require Casey to file the statement required by Section 220-a of the New York Labor Law constituted a waiver of the City's right to withhold payment until such a statement was furnished.

As the Court of Appeals pointed out, the City had ample time (on the motion for summary judgment in the District Court) to cite the absence of a Labor Law statement as a

ground for withholding the Sixth certified Estimate if it had thought it a proper ground to assert. Three times prior to the certification of the Sixth Estimate the City paid certified estimates to respondent, as Casey's assignee, without the Labor Law statement (74a-75a). Obviously, the City did not consider the statement necessary before paying Yonkers Bank, as all moneys assignee (as distinguished from Casey, the contractor) in view of respondent's assignment which contained the trust fund covenant of the contractor required by Section 25, Subdivision 5 of the Lien Law, nor did it conceive it as its duty to require the same, as it did in connection with the first two estimates (prior to the assignment)paid directly to Casey (75a). Moreover, the Labor Law statement (150a-151a), does not require certification by the contractor that no moneys are owed to laborers—merely a statement of the amount due laborers, if any. Even beyond that, while petitioner cites Section 220-a of the Labor Law, it does not refer to Section 220-b (82a-84a), which clearly indicates that moneys are to be deducted by the financial officer of the municipal corporation, from any payment, only where a protest in writing has been filed by a laborer, or "if for any other reason it may be deemed advisable". The record is barren of any protest in writing by an unpaid laborer and since the Sixth Estimate was certified by the City for payment to Yonkers Bank, the City did not deem it advisable to deduct any portion of that payment.

In any event, it was a decision for the City to make, and having made it, Maryland cannot attack it collaterally, because it claims subrogation only to the rights of the City.

The only case cited by petitioner on this point having any resemblance to the rights of Yonkers Bank is *Vulcan Rail & Construction Co., Inc.* v. *County of Westchester*, 250 App. Div. 212 (1937), where the assignee bank lost its

priority over lienors because its assignment did not (as distinguished from the case at bar) contain the trust fund covenants required by Section 25, Subdivision 5 of the Lien Law, the Court having held that the inclusion of the trust fund covenant in the all moneys assignment is a necessary condition of such priority.

7. It ill behooves petitioner to contend that the Court of Appeals erred in granting summary judgment to Yonkers Bank "despite the presence of genuine and material issues of fact". It did not so contend when it itself cross-moved for summary judgment in the District Court. Here the Court of Appeals, after analyzing "the contractual provisions and the documentary evidence" unanimously held

> "On the record we find no material issues of fact."

8. The decision of the Court of Appeals in the instant case was not, as claimed by petitioner, in conflict with that Court's decisions in the two cases cited by petitioner (p. 16).

In the first place, as petitioner concedes, they both involved the priority of the Government tax liens.

Fidelity & Deposit Company of Maryland v. *New York City Housing Authority*, 241 F. 2d 142 (2nd Cir. 1957), aside from the distinctly different contract terms there employed governing payments, involved only "an unpaid balance on the contract" and not, as here, a payment certified to be due and payable, and which should have been paid, prior to default.

Massachusetts Bonding and Insurance Company and United States of America v. *State of New York, In re Fago Construction Corporation*, 259 F. 2d 33 (2nd Cir. 1958), involved a Federal contract, not governed by the New York Lien Law. It did not involve a payment certified to be due and payable, and which should have been

paid, prior to default. In fact, there was no declaration of default in *Massachusetts Bonding* and, insofar as the surety was concerned, it decided only the right to a portion of a progress payment made possible by the surety's advances to the contractor, which had been diverted by the contractor and had subsequently come into the hands of his trustee in bankruptcy. In the instant case the Sixth certified Estimate (for work completed up to May 15, 1956) (133a) was made possible by the advances of Yonkers Bank under its assignment and not by petitioner, which only "About the middle of May, 1956" was informed by Casey that it was in trouble financially and then set up a "program" for the advance of moneys to Casey (138a)—obviously, in the future.

9. The Court of Appeals did not, as claimed by petitioner, decide the issues in this case, in conflict with the decisions of this Court, and the cases cited by petitioner on that issue are inapposite here.

None of them dealt with the status of an all moneys assignee under the New York Lien Law, nor did they involve, as here, a payment certified to be due and payable, and which, because of the contract terms here involved, should have been paid to Yonkers Bank under its all moneys assignment, prior to default, and none of them involve the application of New York law with respect to the importance of contract terms in determining the scope of the owner's right to withhold (and hence the surety's subrogated right thereto) upon the contractor's default, and the importance of the distinctions in the kinds of money involved in applying the subrogation doctrine—as pointed out, *supra*.

Moreover, petitioner's statement under this same point to the effect that as assignee under its blanket indemnity agreement executed on October 21, 1954, it take priority over the assignment to Yonkers Bank, which was executed

February 7, 1956, because petitioner's "assignment was first in time and therefore first in right" is an erroneous statement of the law of New York. Its assignment is wholly invalid and ineffectual as against Yonkers Bank's statutory assignment, valid in all respects under the Lien Law of the State of New York (79a-80a and Appendices 1 and 2 hereof).

10. The present application does not come within any of the considerations governing review on certiorari set forth in Rule 19 of the Rules of this Court, nor are the principles involved in this case "of great importance in so far as the rights of a completing surety as opposed to those of an assignee are concerned", as claimed by petitioner.

The decision of the Court of Appeals does not in any way affect the validity of the subrogation doctrine in and to retained percentages, moneys earned prior to default and not certified to be due and payable and to the balance in contract. It would not "in a great many instances deprive sureties of the protection which they have enjoyed under the law prior to said decision" but is in affirmation of existing New York law as to the limited issue here involved. It is not of vital importance to sureties generally, and is in fact of little, if any, importance to them, because the facts and circumstances of this case and the contract clauses here involved, rarely combine to require the result here reached, which involved no new principles of suretyship or New York contract law. In essence, the Court of Appeals construed a New York contract entirely in keeping with New York law and held that the City failed to pay Yonkers Bank when it should have.

CONCLUSION

The application for the writ should be denied.

Respectfully submitted,

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First National Bank in Yonkers.

Of Counsel,

SAMUEL GOTTESMAN,
GERALD M. SMITH.

Dated: November 10, 1961.

APPENDIX 1

Section 16 of the Lien Law of the State of New York provides as follows:

> "*Assignment of contracts and orders for public improvement to be filed*
>
> No assignment of a contract for the performance of labor or the furnishing of materials for a public improvement, or of the money, or any part thereof, due, or to become due, therefor, nor an order drawn by the contractor or sub-contractor upon the public corporation, or the head of the department or bureau having charge of the construction or demolition of such public improvement, or the financial officer of the public corporation, or other officer or person charged with the custody and disbursement of the corporate funds applicable to the contract for such public improvement, shall be valid unless such assignment or order, or a copy thereof, be filed within twenty days after the date of such assignment of contract, or such assignment of money, or such order, with the head of the department or bureau having charge of such construction or demolition, and with the financial officer of the public corporation or other officer or person charged with the custody and disbursement of the corporate funds applicable to the contract for such public improvement, and such assignment or order shall have effect and be inforceable from the time of such filing, and no such assignment or order shall have any validity until the same shall have been so filed, and every such assignment or order, not recorded, shall be absolutely void as against a subsequent assignee in good faith and for valuable consideration, whose assignment or order is first duly recorded. The financial officer of the public corporation, or other officer or person with whom the assignment order, or copy thereof, is filed, shall enter the facts relating to the same in the lien book or other book provided for such purpose. As amended L. 1944, c. 363, § 10; L. 1947, c. 878, § 3, eff. Sept. 1, 1947."

APPENDIX 2

Section 25 of the Lien Law of the State of New York provided, to the extent here pertinent, as follows:

> *"Priority of liens and assignments under contracts for public improvements. Parity of liens of same class*
>
> In an action to enforce a lien under a contract for a public improvement, or an assignment of moneys, or any part thereof, due or to become due under such contract, parties having liens or assignments shall have priority as follows:
>
> (1) Except as provided in section five an assignee of moneys, or any part thereof, due or to become due under a contract for public improvement, whose assignment is duly filed prior to the filing of a notice of lien or assignment of every other party to the action, shall have priority over those parties to the extent of advances made upon such assignment before the filing of the notice of lien or assignment next subsequent to his assignment, but as to advances made subsequent to a notice of lien or assignment filed and unsatisfied or not discharged such assignee for the purpose of determining his proportionate share of moneys available for distribution as provided in subdivision four of this section shall be treated as a lienor having a lien to the extent of advances so made.
>
> (2) An assignee of moneys or any part thereof, due or to become due under a contract for a public improvement whose assignment is duly filed subsequent to the filing of the notice of lien or assignment of any other party shall for the purpose of determining his proportionate share of moneys available for distribution, as provided in subdivision four of this section be treated as a lienor having a lien to the extent of advances actually made upon such assignment prior to the filing thereof.

(3) Laborers for daily or weekly wages having liens under a contract for a public improvement, shall have preference as a class for the full amount of their unpaid wages over all other lienors having liens arising under the same contract and without reference to the time when such laborers shall have filed their notices of liens.

(4) There shall be no priority among labor lienors, as a class or among other lienors as a class, and any moneys available for distribution among lienors of any class shall be distributed pro rata in accordance with their respective valid liens.

(5) Every assignment of moneys, or any part thereof, due or to become due under a contract for a public improvement shall contain a covenant by the assignor that he will receive any moneys advanced thereunder by the assignee and will hold the right to receive such moneys as a trust fund to be first applied to the payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen arising out of the improvement, and to the payment of premiums on surety bond or bonds filed and premiums on insurance accruing during the making of the improvement, and that he will apply the same to such payments only, before using any part of the moneys for any other purpose. Nothing in this subdivision shall be considered as imposing upon the assignee any obligation to see to the proper application of the moneys advanced under such assignment by the assignee. To the extent that the trust res consists of the right to receive moneys as distinct from moneys actually received, breach of the trust shall give rise to a civil action only. As amended L. 1942, c. 216 § 11 eff. March 29, 1942; L. 1942, c. 808, §§ 8, 10, eff. Sept. 1, 1942."

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